

difference does that make? In Stereo the unauthorized control party, on the facts and circumstances, assumed real-world control of the radio station notwithstanding LMA-type language to the effect that the licensee retained the "ultimate" control of the station, and the FCC threw the book at the station, denying renewal of its license. Here -- where CBS is supplying all funds to upgrade and improve facilities, to pay a million-dollar-a-year LMA fee to the licensee, to pay all station expenses and to assume the full entrepreneurial responsibility for the station -- does it really matter that CBS has paid the funds out of its bank account and maintained its own books and records while WGPR, Inc. keeps its funds in its own bank account and maintains its own books and records? To say "yes" irrationally and unbearably exalts form over substance.

45. With regard to Southwest Texas Public Broadcasting Council, supra, CBS letter at 20, n. 14, the donation of funds for construction and operation of this public broadcast station which, like all public broadcast stations, relies on such donations as its modus operandi, in the normal course and unrelated to any application for transfer of control, bears no resemblance to the instant transaction involving Section 310 of the Act in which a commercial giant in the television industry swallows up a small and struggling station with millions of dollars invested within a few weeks of entry into an LMA as a bridge for interim operations and control pending FCC action on an application for approval of the permanent acquisition and

control of the station.

46. With regard to WHDH, Inc., supra, CBS letter at 20, n. 14, CBS would distinguish that case because it involved a question of "corporate governance." What difference does that make? The question there was who in the real world controlled Boston television station WHDH. The FCC looked at the facts and circumstances and held that such control was vested in the Chief Executive Officer, Mr. Choate, not in the corporate board of directors, the fine print of minutes and corporate statutes to the contrary notwithstanding. Here, we have precisely the same question, *i.e.*, who in the real world controls Detroit television station WGPR, the fine print in the LMA to the contrary notwithstanding. All of the facts and circumstances of record point with laser precision to CBS and its on-site "LMA CEO," Mr. Newman, who, to date, has not favored the Commission with any statement under oath regarding those facts and circumstances.

47. With regard to Phoenix Broadcasting Co., supra, CBS letter at 20, n. 14, CBS passes this off as an old case, decided before the advent of current FCC policies favoring LMA's, on which we have relied heavily. The Phoenix decision may be 22 years old at this juncture, but it is a decision by the full Commission, not the staff, that still stands as a continuing guidepost regarding premature assumption of control under Section 310 of the Act. In Roy R. Russo, 5 FCC Rcd. 7586 (M.Med.Bur. 1990), the Chief of the Mass Media Bureau cited the Phoenix decision for the principle that prospective buyers of broadcast

stations cannot supply funds for station operations during the interim while an assignment application has not yet been approved. This was in 1990, four years ago. In William L. Silva, supra, relied upon heavily by CBS and WGPR, Inc.<sup>5</sup>, the Audio Services Division cited the Phoenix decision for the principle that there is an inherent danger when representatives of the prospective buyer maintain a presence on a day-to-day basis at the station while an assignment application has not yet been approved. This was in October 1994, five months ago. And we again remind the reader that the Commission has made it clear that in LMA cases, no special favors are to be granted and premature assumption of control issues involving LMA's are to be governed by the same precedent that governs all other premature assumption of control issues.

#### IV. Conclusion

48. For the foregoing reasons, as well as those previously submitted to the Commission, a prima facie case has been made that a premature assumption of control has taken place, which must be designated for hearing before the Commission can discharge its statutory duty to determine that approval of the pending assignment application is in the public interest.

49. We have previously argued the Southwest Texas line of cases, involving a three-part test, and the WHDH case, involving a determination of the real-world point of control of a broadcast

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<sup>5</sup> Discussed over some four pages by CBS, letter at 18-21, and the only citation given in the letter of WGPR, Inc.

station. We have previously also made broad references to case precedent and policies under Section 310 of the Communications Act in relation to premature assumption of control. We believe that is ample notice, but in fairness to the agency and the parties, we wish to give notice that we also rely on the common carrier line of cases under Section 310 of the Act expressing a six-part test of premature assumption of control, i.e., Intermountain Microwave, supra, and Telephone and Data Systems, Inc., supra. If the opposing parties deem this notice to warrant a further rejoinder on their part, we consent thereto.

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CERTIFICATE OF SERVICE

I certify that on this 17th day of April 1995, courtesy copies of the foregoing COMMENTS OF SPECTRUM DETROIT are being posted in the United States mails, first class, postage prepaid, addressed to:

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